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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RONNIE BOYCE JONES,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS FOR THE
STATE OF OKLAHOMA**

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February, 1983

QUESTIONS PRESENTED

1. Does a criminal defendant have a Constitutional right under the due process clauses of the Fifth and Fourteenth Amendments to be found guilty before being sentenced? Does the Constitution allow a defendant to be found guilty thirty-nine months after he has been sentenced?

2. Does a criminal defendant have the right to be present at all stages of a criminal prosecution in which evidence against him is heard and his freedom is substantially affected?

3. Was this petitioner denied effective assistance of counsel under the Sixth Amendment in that petitioner's counsel at his trial did not: a) move to disqualify the trial judge who was endorsed as a witness for the State against the petitioner in an earlier proceeding; b) preserve the errors for appeal; c) did not meet the standard of reasonably competent assistance of counsel?

4. Did this petitioner voluntarily waive his right to a jury trial?

5. Did the combined errors in petitioner's case amount to a denial of due process?

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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STATE OF OKLAHOMA**

The petitioner, Ronnie Boyce Jones, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma, entered in this proceeding on October 7, 1982.

OPINION BELOW

The opinion of the Court of Criminal Appeals is designated "not for publication" and appears as Appendix A hereto. No opinion was rendered by the District Court of Cleveland County, Oklahoma.

JURISDICTION

The judgment of the Court of Criminal Appeals for the State of Oklahoma was entered on October 7, 1982. A timely petition for rehearing was denied November 17,

1982, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V of the United States Constitution:
"No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

2. Amendment VI of the United States Constitution:
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

3. Oklahoma Statutes 1971, Volume 22, Section 912, page 2060: "If the indictment or information is for a felony, the defendant must, before the verdict is received, appear in person. If it is for a misdemeanor the verdict may, in the discretion of the Court, be rendered in his absence."

4. Oklahoma Statutes 1971, Volume 22, Section 583, page 2034: "If the indictment or information is for a felony, the defendant must be personally present at the trial."

5. Oklahoma Statutes 1971, Volume 22, Section 970, page 2066: "When the defendant appears for judgment, he

must be informed by the Court, or by the clerk under its direction, of the nature of the indictment or information, and his plea and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him."

6. Oklahoma Statutes 1975 Sess. Laws, Volume 22, Section 982, page 704. The pertinent text of this statute is set forth in Appendix B hereto.

7. Oklahoma Statutes 1971, Volume 20, Section 1403, page 1818: "Any party to any cause pending in a court of record may in term time or in vacation file a written application with the clerk of the court, setting for the grounds or facts upon which the claim is made that the judge is disqualified, and request said judge so to certify, after reasonable notice to the other side, same to be presented to such judge, and upon his failure so to do within three days before said cause is set for trial, application may be made to the proper tribunal for mandamus requiring him to do so."

8. Oklahoma Statutes 1971, Volume 21, Section 801, page 1883. The pertinent text of this statute is set forth in Appendix B hereto.

9. Rule 6 of the Oklahoma Court of Criminal Appeals, Oklahoma Statutes, Volume 22, Chapter 18, Appendix, page 2409. The pertinent text of this rule is set forth in Appendix B hereto.

STATEMENT OF THE CASE

Ronnie Boyce Jones, hereinafter referred to as the petitioner, was tried for the offense of Robbery With A Dangerous Weapon in violation of 21 O.S. 1971 §801, in Case No. CRF-78-329, in the District Court of Cleveland County, Oklahoma, before the Honorable Alan J. Couch, Associate District Judge. An appeal was properly perfected to the Oklahoma Court of Criminal Appeals. His conviction was affirmed in Case No. F-80-196, but remanded to the District Court so that a proper judgment and sentence could be entered. Petitioner's petition for rehearing to the Court of Criminal Appeals was denied without opinion November 17, 1982.

Petitioner was never properly found guilty in this case. No judgment of guilt was ever entered against the petitioner. Petitioner raised this issue in his brief to the Court of Criminal Appeals (appellant's brief, pages 3 and 10), which court disposed of the issue by remanding the case to the District Court with directions to enter a proper judgment and sentence. Petitioner also raised this issue in his petition for rehearing. The Court of Criminal Appeals found the District Court Minute of October 5, 1979, to be insufficient as a judgment and sentence. That court minute does not make any reference to guilt.

Petitioner notes he must have been impliedly found guilty because in the proceedings of his trial held August 3, 1979, the court set the matter for sentencing and asked defendant's counsel about a pre-sentence investigation report. On October 5, 1979, petitioner was sentenced to ten years imprisonment. Transcripts of the proceedings for both

dates are part of the record in this case on file with the Oklahoma Court of Criminal Appeals.

During several stages of the proceedings conducted by the State against the petitioner, the petitioner was not present.

On May 18, 1979, petitioner's non-jury trial was begun. The transcript of that proceeding is part of the record in the Court of Criminal Appeals. On May 29, 1979, the petitioner was hit by a car while riding on a motorcycle and was in critical condition. On August 3, 1979, the non-jury trial continued. The transcript of that proceeding is also part of the record in the Court of Criminal Appeals. That transcript reveals on pages nine and ten that the petitioner was not present on that date. Affidavits filed with the Court of Criminal Appeals, designated as S.O.R. 3, 4, 5, and 6, are affidavits by the court reporter, petitioner, defense attorney, and assistant district attorney, and swear that the petitioner was not present on that date. Yet on that date, petitioner's non-jury trial continued and the matter was set for sentencing at a future date and the court inquired of defense counsel whether a pre-sentence investigation would be necessary.

Petitioner argued to the Court of Criminal Appeals in his brief (Proposition III) that the confrontation and due process clauses of the United States Constitution as well as Oklahoma Statutes, Volume 22, Sections 583 and 912, establish that the presence of the petitioner on August 3, 1979, was essential to the jurisdiction of the court to render a valid judgment or verdict on that date.

The Court of Criminal Appeals answered this contention in its opinion in this case on page 3a of the Appen-

dix hereto. The Court of Criminal Appeals was of the opinion that the proceedings held August 9, 1979, was merely a hearing to determine the validity of the in-court identification by the victim. In addition, the court held this proposition was not of a fundamental nature and not properly preserved for appeal.

The petitioner was also not present at the "Rule 6 hearing" (appellant's brief, page 13), which is a hearing which must be sought by the prosecution when an examining magistrate has found the evidence insufficient at a preliminary examination to bind a defendant over for trial if the prosecution wants to have another chance to continue the case against a defendant. This assignment of error was raised by petitioner in his appellate brief, but was not addressed by the Court of Criminal Appeals. Petitioner was not even given notice of his hearing as required by the Court of Criminal Appeals' own rules (appellant's brief, page 13).

In addition to not being present when he was impliedly found guilty on August 3, 1979, petitioner was never told during his sentencing hearing on October 5, 1979, that he had been found guilty or what crime he had been found guilty of. He was never asked if he had any legal cause to show why judgment should not be pronounced against him. This error was raised in petitioner's appellate brief (page 14). The Court of Criminal Appeals felt this issue had been waived and noted that the trial judge stated, after he had rendered the sentence, "what says the defendant" (Opinion of Court of Criminal Appeals, Appendix p. 3a hereto).

Petitioner was not present when his counsel stated a pre-sentence investigation report would not be necessary. This issue was raised by Proposition IV of petitioner's appellate brief, but was said to be waived by the Court of Criminal Appeals and that it was permissible for counsel to waive the report in the absence of and without the consent of the petitioner (Court of Criminal Appeals Opinion, pages 3a-4a of Appendix hereto).

Petitioner raised the error he was denied effective assistance of counsel in his appellate brief in Proposition V and in his petition for rehearing. After one judge had found the evidence against him insufficient to bind him over for trial, defense counsel waived jury. There are and were substantial problems with the identification of the petitioner, yet jury trial was waived. Defense counsel did not have petitioner testify because of petitioner's previous convictions for forgery and perjury. These convictions were constitutionally suspect and when petitioner's appellate counsel was retained, these convictions were set aside. The order setting those convictions aside are in the record of this case with the Court of Criminal Appeals designated as S.O.R. 19, 20, 21, 23, 24, 25, 26, 27, 28, and 29. One Oklahoma Court of Criminal Appeals case, one United States Supreme Court case, and one Tenth Circuit case, all of which firmly established petitioner's prior convictions as being invalid, were all published before petitioner's trial (appellant's brief, page 21).

Defense counsel also did not move to disqualify the trial judge who was a State's witness endorsed against the petitioner on the perjury informations. It should be noted the petitioner did not plead guilty, but was tried in these

perjury cases. The perjury informations are part of the record in this case designated as S.O.R. 22, 26, and O.R. 78.

In addition, defense counsel did not invoke the rule of sequestration of witnesses and did not advise the trial judge of petitioner's near fatal accident.

The Court of Criminal Appeals felt that the error of lack of reasonably competent counsel had been waived and that had it not been waived, that the standard of representation that the petitioner was entitled at the time of the trial was just representation that was better than a "sham and a mockery" and not the higher standard of "reasonably competent assistance of counsel."

On January 29, 1979, the District Court of Cleveland County entered a minute stating "Defendant waives jury trial and case set for trial on March 20, 1979, at 9:00 a.m. Defendant remains on present bond." This minute is in the record at the Court of Criminal Appeals and is the only evidence of defendant intentionally relinquishing his right to jury trial. The Court of Criminal Appeals, in its opinion, felt the petitioner waived this error.

During the in-court identification of the Petitioner, the State's witness testified he observed a picture of the petitioner on the television set in a home where he (the State's witness) was staying for several weeks after the robbery before he decided petitioner was the man that had robbed him. This error was one of the two that the Court of Criminal Appeals felt was properly preserved for review and it was raised as Proposition VII of petitioner's appellate brief. The Court of Criminal Appeals disposed of the issue by noting that the police were not involved and rules

against suspect identification were only relevant to police instigated identifications and that in this case the identification was reliable (Opinion, Appendix pages 2a-3a hereto).

During the sentencing proceedings, record reflects the judge thought that the petitioner had a murder case pending in a different county (transcript of proceedings held October 10, 1979, which is a part of the record in this case at the Court of Criminal Appeals, pages 6 and 7), and was told by the prosecutor the minimum punishment for Robbery With A Dangerous Weapon (21 O.S. 1971 §801) was ten years when in fact it is five years. This error was raised in petitioner's appellate brief in Proposition VIII, but was determined by the Court of Criminal Appeals to have been harmless error because the trial judge stated the misinformation did not affect his sentence (Opinion, pages 3a-4a of Appendix hereto).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Violates the Confrontation and Due Process Clauses of the United States Constitution.

It seems fundamentally unfair for a defendant to have to go to prison without ever having had an express finding of guilt rendered against him. It seems even more unfair to allow an implied finding of guilt and the waiver of a substantial right like that of a pre-sentence investigation report to be rendered at a proceeding at which the defendant was not present. Finally, a defendant should be told he has been found guilty and what specifically he has been found guilty of and asked if he has any legal cause why judgment should not be rendered against him. These matters have been discussed in *Diaz v. United States*, 228 U.S. 442; *Lewis v. United States*, 146 U.S. 370; *Hoyt v. Utah*, 110 U.S. 574; and *Snyder v. Massachusetts*, 291 U.S. 97. As stated in the Statement of the Case, the petitioner was not present through no fault of his own, through several important stages of his case.

II. The Decision Below Ignores Petitioner's Right to Competent Counsel.

The Statement of the Case, and the record on file in the Oklahoma Court of Criminal Appeals, show that the petitioner had incompetent counsel at trial. The Sixth Amendment demands persons accused of crimes be given competent counsel and the test for competency is something higher than a "sham and a mockery." *McMann v. Richardson*, 397 U.S. 759. Oklahoma adopted the standard of reasonably competent assistance of counsel in *Johnson v. State*, 620 P.2d 1311 (Ok Cr. 1980), but has held it to be

applied prospectively only. Yet, in *Smith v. State*, 650 P.2d 904 (Okla.Cr. 1982), the Court of Criminal Appeals found there was not reasonably competent counsel and reversed. The *Smith* case was tried only five days after the petitioner was sentenced to ten years. It seems inconsistent to say on the one hand that a defendant had competent counsel and then on the other to say that six of eight propositions of error were not properly preserved for review by that same counsel.

III. Petitioner Was Probably Denied a Voluntary and Knowing Waiver of his Right to a Jury Trial.

Courts should indulge every reasonable presumption against a waiver of a fundamental right, *Glasser v. United States*, 315 U.S. 60, such as the right to a jury trial. The court minute discussed in the Statement of the Case should not constitute a valid waiver of jury trial.

IV. Additional Errors Deprived Petitioner of Due Process Which Were Not Recognized By The Oklahoma Court of Criminal Appeals.

The Oklahoma Court of Criminal Appeals should not have differentiated as it did between police controlled identification and other identifications. *United States v. Wade*, 388 U.S. 218. In addition, the Court of Criminal Appeals erred in not granting petitioner a new trial when it learned the trial judge was told the incorrect range of punishment and was confused and thought the petitioner had a murder trial pending against him in a different county.

Even when one individual error might not prejudice a criminal defendant's constitutional rights, the combined

effect of several errors would. In petitioner's case the amount of combined errors deprived him of due process of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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February, 1983

APPENDIX A

NOT FOR PUBLICATION

[Filed Oct. 7, 1982]

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONNIE BOYCE JONES,)	
Appellant,)	
-vs-)	No. F-80-196
)	
THE STATE OF OKLAHOMA,)	
Appellee.)	

OPINION

BUSSEY, Judge:

On March 20, 1978, Jesse Randall Perkins was riding in an automobile with two minor females. As they drove along a country road at dusk they passed two men walking. The automobile came to a stop at an intersection, when the door opened and the two men threatened Perkins with a knife and demanded his wallet, which he surrendered. One of these men was subsequently identified as the defendant below. The defendant was tried for the crime of Robbery with a Dangerous Weapon, was found guilty, and was sentenced to ten (10) years' imprisonment. On appeal from his conviction in Cleveland County, the defendant raises eight (8) assignments of error, only two of which, assignments seven and eight,¹ were properly preserved for review upon appeal.

¹ The assignments of error discussed *infra* were not properly preserved by the defendant and therefore waived. *Stevenson v. State*, 637 P.2d 978 (Okla.Cr.1981), *Turman v. State*, 522 P.2d 247 (Okla.Cr.1974). Had they been preserved on appeal we would have considered them in the following manner:

A) The defendant contends that the State should have been precluded from filing a second information after the first one had been dis-

[APPENDIX]

In one of two properly preserved assignments of error, the appellant argues that his in-court identification by the victim was tainted by impermissible pretrial procedure. This assignment of error must fail. Shortly after the robbery the victim was taken to the home of one of his female companions. While in the home, he noticed a photograph of a person who he said resembled the assailant. The picture was that of the companion's brother, who is the defendant.

We first observe that the alleged photographic identification of the defendant was not a result of any planned activity of the State and, therefore, is neither governed by *Manson v. Braithwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977), nor any conspiracy between the police and

¹ (Continued)

missed. Dismissal of defendant at the preliminary examination stage is not a bar to further prosecution for the same offense. *State v. Robinson*, 544 P.2d 545 (Okla.Cr.1975); and, *Nicodemus v. The District Court of Oklahoma County*, 473 P.2d 312 (Okla.Cr.1970).

The magistrate in this instance was reversed on his decision that there was not probable cause to bind the defendant over for trial, on an appeal by the State under the Rules of this Court, Rule VI. On appeal the associate district judge recommended the issue for further preliminary hearing. Later another associate district judge sustained the defendant's motion to dismiss on the grounds that the court no longer had jurisdiction over him because the order of the magistrate was never vacated.

Had we considered this question upon appeal we would have held that the sustaining of the motion to dismiss was error, because implicit in the remand for further preliminary hearing was a reversal or vacation of the magistrate's previous orders. Also, we would have held that sufficiency of the evidence was not at issue because it was determined by the Rule VI appeal that there was probable cause to bind the defendant over for trial. We would hold this assignment to be without merit.

In a similar fashion we would have determined each of the following assignments to be without merit:

B) In another assignment of error, the defendant contends that his right to be present at all times during the trial was violated. The time

the victim's companion. Moreover, it is abundantly clear that his identification was based upon his observation at the time of the crime. The record clearly shows that the victim observed the defendant face to face in the course of the robbery. The inside light of the automobile was on, providing illumination, and the victim adequately described the defendant for police officers. Also, the victim testified at trial that he was basing his identification upon his memory of the robbery.

The defendant argues in another assignment of error, that he was prejudiced when the State read to the trial court the wrong statute dealing with sentencing. It must be established upon appeal that the defendant's substantial rights were prejudiced. *Mills v. State*, 594 P.2d 374 (Okl. Cr.1979). *Sallee v. State*, 544 P.2d 902 (Okl.Cr.1975). The

¹ (Continued)

in question was a hearing to determine the validity of the in court identification by the victim. *Meadows v. State*, 520 P.2d 381 (Okl.Cr.1974), quoting *Rigsby v. State*, 55 Okl.Cr.61, 24 P.2d 1016 at 1018 says:

It is not necessary for a defendant to be present in court at the trial, except from the beginning of the impaneling of the jury until the verdict is recorded and the jury finally discharged, motions for change of venue, for a new trial, in arrest of judgment and proceedings of that character, not being a part of the trial proper. The presence of defendant is not required.

The absence of the defendant at this hearing did not violate the rights of the defendant for this hearing was not part of the trial proper.

C) In a further assignment, the defendant argues that he was not informed of the nature of his crime and he was not properly informed of the proceedings as provided by 22 O.S.1981 § 970.

The court in sentencing the defendant informed him of the nature of his crime and ended the sentencing by saying "What says the defendant." (Tr. 17, 10/5/79) The trial court is in substantial compliance with the statute in all respects.

D) In still another assignment of error, the defendant asserts that his statutory right to a presentence investigation was not ordered by the

[APPENDIX]

trial judge stated that he was not prejudiced by the misinformation, and the defendant has failed to establish actual prejudice. This assignment of error is without merit.

Accordingly, the judgment and sentence is hereby AFFIRMED. We note that it appears that a proper judgment and sentence has not been entered, only a court minute being present in the record before us, the case is therefore REMANDED to the district court so that a proper judgment and sentence may be entered.

AN APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA
THE HONORABLE ALAN J. COUCH,
ASSOCIATE DISTRICT JUDGE

RONNIE BOYCE JONES, appellant, was convicted of Robbery with a Dangerous Weapon, in Cleveland County Dis-

1 (Continued)

judge. A defendant may affirmatively waive this right to a presentence investigation, *Smith v. State*, 594 P.2d 784 (Okla. Cr. 1979), *Sarsycki v. State*, 540 P.2d 588 (Okla. Cr. 1975). In this instance, the trial court twice asked the defense counsel if a presentence investigation would be requested and twice the defense counsel said it would not be necessary. (Tr. 11, 8/3/79). Clearly, the presentence investigation was waived.

E) The defendant also argues that he was denied reasonably competent assistance of counsel. The standard of reasonable competence was adopted in *Johnson v. State*, 620 P.2d 1311 (Okla. Cr. 1980). *Johnson* expressly holds that the new standard is to be applied retrospectively only. Since the *Johnson* decision was rendered on October 22, 1980, and the defendant in this case was tried on May 18, 1979, the reasonable competence standard does not apply. See *Ferguson v. State*, ____ P.2d ____ (Okla. Cr. 1982), 53 O.B.A.J. 1203.

The standard applicable here is the "sham and mockery" test. The defendant in his brief admits that this standard was not violated.

F) In the final assignment of error, the defendant argues that he was denied his right to a trial by jury. A careful review of the record shows that this right was waived by the defendant.

trict Court, Case No. CRF-78-329, was sentenced to ten (10) years' imprisonment, and he appeals. AFFIRMED.

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OPINION BY BUSSEY, J.

BRETT, P.J., CONCURS IN RESULTS
CORNISH, J., CONCURS IN RESULTS

APPENDIX B

Oklahoma Statutes 1975 Sess. Laws, Volume 22, Section 982, page 704:

§ 982. *Presentence Investigation*

Whenever a person is convicted of a felony except when the death sentence is imposed, the court shall, before imposing sentence to commit any felon to incarceration by the Department of Corrections, order a presentence investigation to be made by the Division of Probation and Parole of the Department. The Division shall thereupon inquire into the circumstances of the offense, and the criminal record, social history and present condition of the convicted person; and shall make a report of such investigation to the court, including a recommendation as to appropriate sentence, and specifically a recommendation for or against probation. Such reports must be presented to the judge so requesting, within a reasonable time, and upon the failure to so present the same, the judge may proceed with sentencing. Whenever, in the opinion of the court or the Division, it is desirable, the investigation shall include a physical and mental examination of the convicted person. The reports so received shall not be referred to or be considered in any appeal proceedings. Before imposing sentence, the court shall advise the defendant or his counsel and the district attorney of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. If either the defendant or the district attorney desires, such hearing shall be ordered by the court providing either party an opportunity to offer evidence proving or disproving any finding contained in such report, which shall be a hearing in mitigation or aggravation of punishment.

If the district attorney and the defendant desire to waive such presentence investigation and report, both shall execute a suitable waiver subject to approval of the court, whereupon the judge shall proceed with the sentencing.

[APPENDIX]

Oklahoma Statutes 1971, Volume 21, Section 801, page 1883:

§ 801. *Robbery or attempted robbery with dangerous weapon or imitation firearm—Punishment*

Any person or persons who, with the use of any firearms or any other dangerous weapons, whether the firearm is loaded or not, or who uses a blank or imitation firearm capable of raising in the mind of the one threatened with such device a fear that it is a real firearm, attempts to rob or robs any person or persons, or who robs or attempts to rob any place of business, residence or banking institution or any other place inhabited or attended by any person or persons at any time, either day or night, shall be guilty of a felony, and, upon conviction therefor, shall suffer punishment by imprisonment for life at hard labor, in the State Penitentiary, or for a period of time of not less than five (5) years, at the discretion of the court, or the jury trying the same.

Rule 6 of the Oklahoma Court of Criminal Appeals, Oklahoma Statutes, Volume 22, Chapter 18, Appendix, page 2409:

Rule 6.2 *Written Application to Appeal and Manner of Service*

Thereafter, within five (5) days from the magistrate's decision, the State shall file with the court clerk a written application to appeal from the adverse ruling or order of the magistrate, and a copy of the application shall immediately be presented by the State to the Presiding Judge of the Judicial Administrative District. In the absence of that Presiding Judge, the State shall contact the office of the Administrative Director of the Courts, State of Oklahoma, at (405) 521-2318, to ascertain the name of the Acting Presiding Judge of the Judicial Administrative District, who may assign the application to another district judge or asso-

ciate district judge to be docketed for hearing and decision within twenty (20) days from the filing of the application; PROVIDED, HOWEVER, that at least three (3) days prior to the time set for the hearing the State shall personally, or by certified mail, serve notice upon the accused, or the attorney of record, of the time and place set for the hearing of the State's application.
